

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL, INC., COMEDY)	
PARTNERS, COUNTRY MUSIC)	
TELEVISION, INC., PARAMOUNT)	
PICTURES CORPORATION, and BLACK)	
ENTERTAINMENT TELEVISION LLC,)	
Plaintiffs,)	
vs.)	Case No. 1:07CV02103
)
YOUTUBE, INC., YOUTUBE, LLC,)	
and GOOGLE, INC.,)	
)
Defendants.)	
_____)	
)
THE FOOTBALL ASSOCIATION PREMIER)	
LEAGUE LIMITED, BOURNE CO., et al.,)	
on behalf of themselves and all)	
others similarly situated,)	
)
Plaintiffs,)	
vs.)	Case No. 07CV3582
)
YOUTUBE, INC., YOUTUBE, LLC, and)	
GOOGLE, INC.,)	
)
Defendants.)	
_____)	

DEPOSITION OF MICAH SCHAFFER

SAN FRANCISCO, CALIFORNIA

WEDNESDAY, JULY 23, 2008

REPORTED BY:

YVONNE FENNELLY, CRP, CSR NO. 5495

JOB NO. 15376

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5 JULY 23, 2008

6 10:00 a.m.
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8 VIDEOTAPED DEPOSITION OF MICAH SCHAFFER,
9 held at the offices of SHEARMAN & STERLING,
10 525 Market Street, San Francisco, California,
11 pursuant to notice, before YVONNE FENNELLY, CRP,
12 CSR License No. 5495.
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02:03 Premier League content?

02:03 A. These are very different times,

02:03 chronologically. This e-mail is from May 2006. Our
02:03 site was a very different size then, and we were a small
02:03 company still figuring out exactly what the appropriate
02:03 balance was and how to scale things like this.

02:03 So one of the things that we discovered as we
02:03 were doing this -- and of course we were doing this
02:03 because -- we were doing this for the RIAA because we
02:03 wanted to be helpful; right? We wanted to work with
02:03 content owners, and especially when they first signed up
02:03 for it, I imagine, you know, there was somewhat of a
02:04 backlog when they first began removing their content
02:04 from YouTube. There has got to be, you know, some extra
02:04 content that had been previously uploaded, and we
02:04 didn't -- you know, we felt that it would be a good
02:04 service to provide to them to, you know, to try to help
02:04 them with that burden.

02:04 But what we found over time was that, first, we
02:04 weren't very good at it. We couldn't tell, you know,
02:04 what was authorized or not. We really wouldn't know
02:04 necessarily who had uploaded it. We wouldn't know
02:04 whether particular videos were authorized or if, like,
02:04 NBC -- NBC is a great example of someone who was using

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02:10 scans, sure.

02:10 Q. Do you recall any discussions about whether or
02:10 not to continue the practice?

02:10 A. I don't recall.

02:10 Q. You mentioned that one aspect of proactive
02:10 scanning involves the potential misidentifications or
02:10 incorrect decisions; is that right?

02:10 A. Absolutely.

02:10 Q. Were you involved in or aware of any analysis
02:10 that YouTube did as to the extent of misidentifications
02:10 from proactive scanning?

02:10 A. I don't recall any specifically.

02:10 Q. To be more particular about the point, do you
02:10 recall anybody at YouTube doing any analysis to see
02:11 quantitatively how often misidentifications occurred
02:11 from proactive scanning?

02:11 A. I think it was more anecdotal.

02:11 Q. You referred to difficulties with scalability
02:11 as videos on the site grew; is that correct?

02:11 A. Sure.

02:11 Q. Do you recall any analysis at YouTube as to the
02:11 viability of proactive scanning to remove content with
02:11 the increased traffic and number of videos at the site?

02:11 A. I think it was more of a general notion that

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02:29 2 In fact, you know, you meant generally?

02:29 3 Customer support, responding to copyright takedown
02:29 4 notices is a big part of it, removing inappropriate
02:29 5 content that had been flagged, support e-mails, those
02:29 6 types of tasks.

02:29 7 Q. And did Ms. Gillette have a practice of
02:29 8 creating a priority list for each day?

02:30 9 A. I don't think so.

02:30 10 Q. Do you recall what her practice was in terms of
02:30 11 generating priorities lists or what circumstances she
02:30 12 would do it?

02:30 13 A. Probably whenever she felt the need maybe. It
02:30 14 changed. I don't know. I wouldn't -- I might be on the
02:30 15 list that would receive them, but they wouldn't
02:30 16 typically define my work, so I'm not too familiar with
02:30 17 the logistics of the priorities lists.

02:30 18 Q. You recall that they were conveyed to you as
02:30 19 priorities for your work?

02:30 20 A. No. For other members of the team, but I might
02:30 21 be privy to them.

02:30 22 Q. There is a reference in item 12 here, Proactive
02:30 23 scans copyright scans (don't forget American Idol)?

02:30 24 A. Yes.

02:30 25 Q. Do you recall whether the operations team

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02:30 2 scanned for American Idol?

02:31 3 A. On occasions.

02:31 4 Q. Were you involved in proactive scans for
02:31 5 American Idol?

02:31 6 A. On occasions.

02:31 7 Q. And what occasions would give rise to the
02:31 8 proactive scans?

02:31 9 A. We had been in -- some of this is probably
02:31 10 privileged.

02:31 11 MR. SCHAPIRO: Can you give as much of an
02:31 12 answer as you can without discussing any legal advice
02:31 13 that you received or sought?

02:31 14 THE WITNESS: Yes, I can try to be general
02:31 15 enough.

02:31 16 So we had been working with -- I believe it's
02:31 17 Fremantle owns American Idol. They were very adamant --
02:32 18 they were very upset by the presence of content that
02:32 19 they felt -- or content that they owned that was being
02:32 20 uploaded to YouTube. And we would ask them, plead with
02:32 21 them really for URL's, for specific links, for specific
02:32 22 indications what content they were talking about, and
02:32 23 they were not very cooperative. They refused to provide
02:32 24 on most occasions specific information and were
02:32 25 threatening to sue us on a fairly regular basis on very

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02:32 2 strong terms. And particularly this would happen, you
02:32 3 know, right around the time -- of course it's a cyclical
02:32 4 show; right, it's a series. So right during the time a
02:33 5 show would air they would come down; they would get
02:33 6 particularly more upset.

02:33 7 And, you know, in August we were still -- you
02:33 8 know, we hadn't been bought by Google yet. We were very
02:33 9 resource constrained. And even though we were operating
02:33 10 within the law, my feeling at least, and I imagine the
02:33 11 feeling of others was that a lawsuit would be very bad
02:33 12 and that we might not be able to adequately defend
02:33 13 ourselves. So even though I don't think we were
02:33 14 obligated to go scan and guess which content was
02:33 15 American Idol, and I know mistakes were made because
02:34 16 there is many different idol shows around the world,
02:34 17 there are parodies, there are lots of videos. I mean,
02:34 18 people, you know, singing in their bathrooms or their
02:34 19 bedrooms, and they would tag it American Idol because
02:34 20 they are doing their best, you know, or they're
02:34 21 commenting on American Idol, and things like that. And
02:34 22 sometimes, you know, inevitably those videos would get
02:34 23 swept up in this, but we kept doing those scans for a
02:34 24 time simply because it was -- you know, if we had gotten
02:34 25 sued at that point, even though we were doing nothing

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02:34 2 wrong, it wouldn't necessarily matter that we were in
02:34 3 the right because we didn't necessarily have the
02:34 4 resources to adequately defend ourselves, so, you know,
02:34 5 they bullied us. And even though we really -- and the
02:34 6 irony is we really wanted to cooperate. We really
02:34 7 genuinely wanted their content down; and, that's why in
02:35 8 the end we'd grudgingly do these searches for them even
02:35 9 though it really wasn't the most effective use.

02:35 10 We offered them the tool repeatedly, you know,
02:35 11 our content verification program. We pleaded with them
02:35 12 to work with us. And we really, you know, sort of, in
02:35 13 the absence of their cooperation, we bent over backwards
02:35 14 trying to accommodate them.

02:35 15 Q. Did you speak to anyone at Fremantle?

02:35 16 MR. SCHAPIRO: When?

02:35 17 BY MR. SHAFTEL:

02:35 18 Q. By August of 2006, about their concerns over
02:35 19 the infringing content on the site?

02:35 20 A. I don't know if I personally had contact with
02:35 21 them directly. And again, getting into privilege, I
02:35 22 would be hesitant to characterize my knowledge of other
02:35 23 communications.

02:35 24 MR. SCHAPIRO: Don't answer further.

02:35 25 BY MR. SHAFTEL:

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02:41 2 A. I didn't see the second page. Hang on a
02:41 3 moment.

02:41 4 No.

02:41 5 Q. Have you ever seen a document in which the
02:41 6 format resembles this?

02:41 7 A. No, I don't recall ever seeing a document that
02:41 8 looked like this.

02:41 9 Q. Do you see in the middle of the page there is a
02:41 10 number of what appears to be TV shows or other
02:41 11 entertainment content identified that begins with
02:41 12 American Idol, Simpsons, Family Guy?

02:41 13 A. Yes.

02:41 14 Q. Does that grouping of content have any meaning
02:42 15 to you?

02:42 16 And specifically, were those videos that at
02:42 17 this point in time were being proactively scanned for?

02:42 18 A. In the context of the document, I'm not sure if
02:42 19 they're necessarily search terms. I think it's probably
02:42 20 a reasonable assessment that they are related to content
02:42 21 to proactively look for.

02:42 22 Q. In August of 2006, how many videos do you
02:42 23 recall approximately being on the YouTube site?

02:42 24 A. I have no idea. Lots.

02:42 25 Q. Do you recall whether YouTube engaged in any

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02:43 2 proactive scanning to remove content after the
02:43 3 acquisition by Google in November of 2006?

02:43 4 A. I don't recall specifically. I guess it comes
02:43 5 back to exactly what we mean by "proactive."

02:43 6 If being threatened and prompted and instructed
02:43 7 by Fremantle, for instance, and then taking action based
02:43 8 on the information they provided and conveyed and
02:43 9 requested, I would say, then, I do recall that
02:44 10 happening. I forget the level of detail. I know
02:44 11 eventually they began providing us with more detailed
02:44 12 information about what they would like removed, and we
02:44 13 responded, you know, to those requests.

02:44 14 I don't recall with regard specifically to
02:44 15 proactively searching for content without prompting in
02:44 16 that regard.

02:44 17 Q. So I can understand, you recall searching for
02:44 18 Fremantle content to remove without specific URL's from
02:45 19 Fremantle or DMCA notice after the Google acquisition;
02:45 20 is that correct?

02:45 21 A. I believe so.

02:45 22 I believe there were instances where they
02:45 23 provided -- I know at some point they began -- I
02:45 24 remember receiving, I think it was like a printout of
02:45 25 search results that Fremantle had provided and doing

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02:45 2 removals based on that. And I know there was some back
02:45 3 and forth around that.

02:45 4 Q. Do you recall doing that for anyone else
02:45 5 besides Fremantle after the Google acquisition?

02:45 6 A. I believe there were probably others.

02:45 7 Q. Who do you recall?

02:45 8 A. And to varying degrees, of course; right? As I
02:45 9 said earlier, we regularly remove content without
02:46 10 fully -- without fully formed technically valid DMCA
02:46 11 takedown notices. And it's kind of a spectrum of, you
02:46 12 know, of the amount of specificity and the amount of
02:46 13 technical accuracy, and we try to respond appropriately
02:46 14 based on the circumstances. And I know we've removed a
02:46 15 substantial amount of Viacom content without fully
02:46 16 formed DMCA notices as well.

02:46 17 Q. Do you recall removing Viacom content that was
02:46 18 uploaded after the date of whatever communication you're
02:47 19 relying on, even if it's not, as you put it, a fully
02:47 20 formed DMC notice?

02:47 21 MR. SCHAPIRO: Objection; vague, ambiguous.

02:47 22 BY MR. SHAFTEL:

02:47 23 Q. You've described the situation where a content
02:47 24 owner submits a notification that I believe you put it,
02:47 25 is not fully formed; it may have some technical defect.

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03:27 2 know, fraud detection and spam and things like that.

03:28 3 YouTube has not yet fully integrated with

03:28 4 Google's account management system. I believe we have

03:28 5 plans to in the near term, and it involves a lot of

03:28 6 other moving pieces, but to the extent possible, we try

03:28 7 to leverage that system.

03:28 8 BY MR. SHAFTEL:

03:28 9 Q. Thank you.

03:28 10 You had testified earlier today about MD5

03:28 11 hashes.

03:28 12 Am I correct that when content is removed

03:28 13 pursuant to the DMCA process, YouTube then takes some

03:28 14 action based on MD5 hashes?

03:28 15 A. Yes.

03:28 16 Q. How does it work?

03:28 17 A. So when content is removed for terms of use

03:29 18 violation or in response to a copyright notification,

03:29 19 our system automatically implements a block on the

03:29 20 originally uploaded files, MD5 hash.

03:29 21 Q. Do the MD5 hashes, have they ever at YouTube

03:29 22 operated to delete videos that were existing on the

03:29 23 system before the video that is taken down?

03:29 24 A. So the question is about preexisting?

03:29 25 Q. Exactly.

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04:56 Are you aware of any ideas that were expressed
04:56 within YouTube or then Google post-acquisition to detect
04:56 or exclude copyrighted infringing material on a site
04:56 that the company didn't implement?
04:56 A. You said "detect," or is there another part?
04:56 Q. Exclude. Block.
04:56 A. So it involved blocking as a result of
04:56 detecting?
04:56 Q. (Nods head.)
04:56 A. None that I can recall.
04:56 Q. I'd asked you earlier about private videos or
04:57 Friend Share videos.
04:57 A. Yes.
04:57 Q. Do you understand that to be a program where
04:57 the uploader can limit the number of visitors to the
04:57 uploader's video or site page?
04:57 A. I'm sorry?
04:57 Q. What's the private -- what's the private video
04:57 program? What does it mean?
04:57 A. Users can designate a video as private either
04:57 when they upload it or subsequently by altering their
04:57 preferences and allows the video to be viewed by a
04:57 limited audience of their choosing.
04:57 Q. And how are private videos monitored for your

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05:40 MR. MCGILL: Are we up to Exhibit 17 or 15?

05:40 THE WITNESS: The last one was 15.

05:40 MR. MCGILL: So this should be 16.

05:41 THE WITNESS: Okay.

05:41 BY MR. COX:

05:41 Q. In this declaration, Mr. Chen states that

05:41 YouTube does not manually screen videos before they are

05:41 made available through the service.

05:41 Do you agree with that statement?

05:41 A. So at the time of this declaration -- actually,

05:41 I see the date of the hearing. I'm not sure when the

05:41 declaration was executed.

05:41 January 5th, apparently, 2007. I don't believe

05:41 that was our standard practice, no.

05:41 Q. I'm sorry. To clarify, you don't believe that

05:41 screening videos manually before they were made

05:41 available was your standard practice? So you agree with

05:42 the statement?

05:42 A. I don't believe that was our practice.

05:42 Q. Do you know of any other time when that was

05:42 your practice?

05:42 A. I think the sentence is slightly ambiguous. I

05:42 wouldn't want to preclude the kinds of things we

05:42 discussed earlier with regards to private videos, though

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05:42 I suppose those were available. So no, I guess I'm not
05:42 aware of any circumstances.

05:42 Q. After the videos were made available through
05:42 the service at the time of this declaration, were you
05:42 aware of efforts YouTube was making to manually screen
05:43 videos?

05:43 MR. SCHAPIRO: Objection to the form of the
05:43 question.

05:43 THE WITNESS: Well, again, I think the term
05:43 "manually screen videos" is ambiguous.

05:43 BY MR. SHAFTEL:

05:43 Q. In what way?

05:43 A. So I'm not sure -- it could mean any number of
05:43 things.

05:43 Q. What are the different things you think it
05:43 could mean?

05:43 A. It could refer to -- and again, we're talking
05:43 about after they're available through the service?

05:43 Q. Yes.

05:43 A. It could refer to when a content owner sends in
05:43 a nonspecific takedown notice, perhaps involving search
05:43 terms, or even search results that would require us to
05:44 go through and manually look through the content that's
05:44 being referred to.